IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 763

HUGH GREER CARRUTHERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, NO. 8790 AND BRIEF IN SUPPORT THEREOF.

WALTER BACHRACH,
WALTER H. MOSES,
MORRIS SOLOMON,
H. G. SHEFFNER,
Attorneys for Petitioner,
231 South LaSalle Street,
Chicago 4, Illinois.

PRINTED BY CHICAGO LAW PRINTING CO.

INDEX.

Subject Index.

CASES CITED.

PAGE

CASES CITED (Continued).

STATUTES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No.

HUGH GREER CARRUTHERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered December 27, 1945, affirming a judgment, entered on a verdict, of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered February 20, 1945, convicting petitioner upon an indictment charging violation of the Mail Fraud Act, the fraud section of the Securities Act of 1933 and the Conspiracy Statute.

Opinion Below.

The opinion of the Circuit Court of Appeals is as yet unreported. It appears at Rec. 503.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 27, 1945. Jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1945, 28 U. S. C. 347 (a). See also Rule XI of the Criminal Appeals Rules promulgated by this Court, May 7, 1934. Stay of mandate pending this petition was entered January 2, 1946.

Questions Presented.

1. Whether the free exercise of religion guaranteed to petitioner by the First Amendment to the Constitution was not violated by the court's charge to the jury as follows: (Rec. 455-456)

> "The first amendment of the constitution of the United States provides as follows:
>
> > 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'
>
> This provision of the constitution as a matter of law, protects the defendants, and each of them, from any inquiry by you into the truth or falsity of any of the religious beliefs, or doctrines, or representations made by the defendants, or any of them, which dealt with such beliefs or doctrines. In the consideration of the question of the guilt or innocence of the defendants in this case you must assume that any and all representations made by the defendants, or any of them, concerning matters pertaining to their religious beliefs or doctrines, were true at the time they were made, and this is so, irrespective as to whether such repre-

sentations were written or oral, or partly written and partly oral, or merely based upon inferences which you may draw from printed or written documents in evidence.

You are further instructed that representations of the defendants, or any of them, concerning or relating to the subjects of breathing, silence, and position of persons during sleep, if you believe that they are matters within the field of religion, as taught by the defendant Carruthers, and the truth or falsity of such representations, if any, may not be questioned in any way by you in arriving at your verdict in this case."

2. Whether the denial of petitioner's motion, promptly made, to withdraw a juror and continue the case, based upon the reading by a juror of an admittedly inflammatory and grossly prejudicial newspaper article published during the trial, was not reversible error. The article, which was published in the *Chicago Daily News,* reads as follows: (Rec. 438)

"LAMA DODGES QUESTIONING ON ROBBERY.

The Kum Bum Lama dodged the witness stand in his Federal Court fraud trial this afternoon, and averted a showup of his career as highway robber before he grew a beard and named himself Dr. Hugh Greer Carruthers.

The defense rested, and then Judge Philip L. Sullivan denied a defense motion for a directed verdict of not guilty offered for Carruthers. The judge held in abeyance, until he receives the jury's verdict, motions for directed acquittal of the other defendants, Evelyn Kroell and Mary Morel.

Prosecutor Francis J. McGreal had planned to put into the record, in cross-examination, the fact that Carruthers, under his real name of Henry Boerum, Jr., served a prison term in New York State for highway robbery. The failure of Carruthers to testify prevented this.

The defense attorneys, Walter Bachrach and Edward Hess, asked a directed acquittal on argument that Carruthers' Neological Foundation was a religion, like the 'I am' cult, whose sponsors won in the high courts.

The defense had conceded in court that the 'doctor' was really only Henry, a postal clerk from Brooklyn, and had not been educated as a lama in Tibet, but had merely learned the alphabet and some words as a fifth grade pupil in a Brooklyn public school.

Closing arguments will begin Monday."

3. Whether the charge to the jury relative to the presumption of innocence was not so improper and did not necessarily result in prejudice to petitioner of so fundamental a character as to deprive him of a fair trial and to require a reversal of the conviction, even though no exception was taken to it. The charge in question was as follows: (Rec. 454)

"The defendants under the law are presumed to be innocent of the charge. This presumption remains throughout the trial with the defendants until you have been satisfied by the evidence in the case beyond all reasonable doubt of the guilt of the defendants or either of them.

This presumption of innocence is not intended to aid anyone who is in fact guilty of crime to escape, but is a humane provision of the law intended, so far as human agencies can, to prevent an innocent person from being convicted."

Statutes Involved.

Sec. 215 of the Criminal Code, commonly referred to as the Mail Fraud Act, 18 U. S. C., Sec. 338, provides in part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining

money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, * * * in any post office * * * of the United States * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both."

Sec. 17(a)(1) of Title I of the Securities Act of 1933, 15 U. S. C., 77 q(a)(1) provides as follows:

"(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—(1) To employ any device, scheme, or artifice to defraud, or"

Sec. 37 of the Criminal Code, 18 U. S. C., Sec. 88, provides as follows:

"If two or more persons conspire either to commit any offense against the United States, * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Sec. 632 of Title 28 U. S. C., provides as follows:

"In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, * * * the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

Summary Statement.

Petitioner was one of three defendants[1] named in an indictment consisting of 36 counts. The first 9 charge a violation of Sec. 77q (a)(1) of Title 15, U.S.C.A. Counts 10 to 35, both inclusive, charge a violation of the mail fraud statute, Sec. 338 of Title 18, U.S.C.A., and Count 36 charges a conspiracy under Sec. 88 of Title 18, U.S.C.A., to commit the substantive offenses described in Counts 1 to 35, both inclusive.[2]

Count 1 of the indictment sets forth an alleged scheme[3] to defraud in connection with the sale of receipts, promissory notes and evidences of indebtedness of the Neological Foundation and of petitioner, Hugh Greer Carruthers. It is alleged that as a part of the scheme the defendants organized the Neological Foundation, an unincorporated society, and that the petitioner, Carruthers, broadcast a radio program of a spiritual and economic character for the purpose of obtaining members who would pay dues and make investments in the Neological Foundation, and that (Rec. 4) he prepared, published, mailed and delivered to listeners to the radio program who inquired for further information and to prospective and actual members of the organization, certain pamphlets, lessons and literature which related to the purposes, activities and functions of the Foundation. (Rec. 5) These lessons, pamphlets, letters and literature, according to the allegations, were for the purpose of assisting and enabling members of the Foundation and persons intended to be defrauded to find personal

---

[1] Two defendants were acquitted by the District Court after verdict of guilty was returned against the three.

[2] Counts 5 and 9 were eliminated on the motion of the Government at the close of its case.

[3] The scheme alleged in the first count was incorporated by reference into all succeeding counts.

satisfaction and solace and to better themselves economically and socially. (Rec. 6)

It is also alleged that "it was a further part of said scheme and artifice that the said defendants would, intended to and did cause to be formed, created and organized, and did form, create and organize clubs, associations, groups and classes within and among the members of the said Neological Foundation, and among the persons intended to be defrauded, for the purpose of further and more detailed study and benefit from the teachings, philosophy, and creed of the said Neological Foundation and the said defendants (including petitioner)." (Rec. 7)

Seventeen Government witnesses (Rec. 190, 194, 196, 201, 213, 216, 218, 224, 227, 229, 231, 235, 238, 251, 266, 273, 281) and forty-nine defense witnesses (Rec. 291, 294, 298, 303, 314, 308, 311, 313, 316, 318, 319, 320, 323, 325, 329, 330, 331, 336, 338, 341, 343, 346, 350, 354, 357, 360, 362, 363, 367, 368, 371, 372, 374, 376, 377, 378, 380, 382, 383, 384, 387, 388, 389, 391, 393, 410, 411, 412, 414, 419, 422) testified that the Neological Foundation and the teaching of petitioner were of a religious character. No witness testified to the contrary.

The Prosecutor elicited on his examination of a Government witness (Rec. 251) and his cross-examination of witnesses called by petitioner that he had given instruction to the members upon the subject matter of breathing, silence, (meditation and prayer) and position of persons during sleep. No evidence showing the falsity of such instruction or representations was introduced, but by such examination and cross examination the Prosecutor did his best to ridicule the teachings on the subject of breathing, silence and the position of persons in sleep, the teacher, and the witnesses and other members who believed in them and testified to the benefits which in their opinions were derived by them from such instruction. (Rec. 291, 292, 298, 300, 303,

309, 312, 314, 320, 329, 330, 333, 337, 344, 346, 356, 364, 366, 369, 379, 381, 382, 383, 385, 391, 413, 416, 420)

The Circuit Court of Appeals in its opinion held that the subjects of "breathing" and "silence" find expression as a religious practice in the ancient Yoga creed (29 Encyclopedia Americana 638) and that they constitute "religious doctrine." (Rec. 511) Nevertheless, that court sustained the action of the trial court in instructing the jury that the question whether such matters were within the field of religion, as taught by petitioner, (Rec. 510, 511) was an issue of fact for the jury.

Petitioner did not testify as a witness on the trial. Consequently he was not subject to impeachment because of any alleged past criminal record and no reference could properly be made to his failure to take the stand (Sec. 632 Title 28 U. S. C.). Both of such results, however, were accomplished in the following manner:

The taking of the testimony was closed on Friday afternoon, February 16, 1945, about 2:30 and the jurors were allowed to separate and go to their homes. In the evening edition of the Chicago Daily News, a newspaper with wide circulation, there appeared an article which the Circuit Court of Appeals in its opinion in the case at bar describes as (Rec. 512) "inflammatory and prejudicial" in character and its publication prior to verdict "improper and unethical." That article stated (see pp. 3, 4, *supra*) that petitioner had "dodged the witness stand in his Federal Court fraud trial this afternoon, and averted a show-up of his career as a highway robber." The article further stated that the Prosecutor "had planned to put into the record in cross-examination the fact that petitioner had served a prison term in New York state for highway robbery."

This article was made the basis of a motion by petitioner's counsel on the following Monday morning for a

mistrial. At petitioner's request a poll of the jury was had which established the fact that one of the regular members of the jury panel had read the article in question. The record shows that the trial judge was sufficiently concerned with the seriousness of the motion based upon the damaging and prejudicial character of the newspaper article as to contemplate the substitution of an alternate juror. When he ascertained that the governing statute would not permit such substitution, he stated that he would not substitute an alternate for the juror who had read the article. Despite such conclusion, he denied the motion for mistrial. In so doing he stated in referring to such article: "One juror did read it, he said it was what took place after the closing of the case on Friday, and that is why I denied the motion" (Rec. 453).

Notwithstanding its recognition of the inflammatory and prejudicial character of the newspaper article the Circuit Court of Appeals held that the poll of the juror who read the article indicated that his mind "was not in any way affected by what he had seen or read." That court concluded that "under such circumstances we think Appellant (petitioner) has failed to show prejudice resulting to him from the publication of the article and we hold that there was no abuse of discretion on the part of the trial court in the denial of his motion." That the mind of the juror in question who admittedly read the article was prejudicially affected appears on pages 28 to 30 hereof.

The Circuit Court of Appeals in its decision sustained the action of the trial court in instructing the jury that the presumption of innocence is not intended to aid anyone *who is in fact guilty* of crime to escape (Rec. 515).

Reasons for Granting the Writ.

At no time in its history has this Court evidenced a greater interest in the protection of religious freedom than since its reconstitution beginning in 1937. In *United States* v. *Ballard*, 322 U. S. 78, this Court dealt with fundamental questions of accommodation of the Mail Fraud Act to the free exercise of religion guaranteed by the First Amendment to the Constitution, and with the proper manner of implementing such Constitutional protection in criminal trials where the alleged scheme to defraud involved representations embraced within the religious beliefs of the defendant. The Court by the instruction complained of herein—by leaving to the jury whether representations of petitioner relating to the subjects of breathing, silence and position of persons during sleep were in their opinions matters within the field of religion as taught by petitioner and by instructing that only in the event that such matters were found by the jury as a fact to be within the field of religion, as taught by petitioner, that the truth or falsity thereof might not be questioned by them in arriving at their verdict—was instructing the jury in a manner which probably conflicts with the decision of this Court in *U. S.* v. *Ballard*, 322 U. S. 78, and the Circuit Court of Appeals of the 7th Circuit in affirming the judgment of the District Court has decided a question of Constitutional law affecting the free exercise of religion which has not been, but which should be, settled by this Court.

The substantial increase in religious prejudice and intolerance resulting from the teachings of Hitler and his followers has very greatly heightened during the past decade the danger, always substantial, that criminal trials of persons of unorthodox religious beliefs would descend into "heresy" trials. This is especially true where the

strange religious beliefs find expression in teachings which are treated by the Government as being embraced within an alleged scheme to defraud. In such cases only the wisest and most intelligent guidance of the jury by judges of unusual competence and religious objectivity can assure to the accused performance by the Government of the guarantee of the free exercise of his religion which the Constitution justified him in assuming to be his legal right.

In *United States* v. *Ballard*, 322 U. S. 78, this Court gave practical recognition to the need of expanding the province of the judge and narrowing the field of jury inquiry as much as possible by foreclosing any issue as to the truth or falsity of representations concerning matters of religious beliefs of defendants in mail fraud prosecutions and by requiring the court to charge the jury as a matter of law that they must assume to be true in arriving at their verdict all representations of such character. The instruction complained of herein raises an issue of paramount Constitutional importance calling for settlement by this Court, whether the protection provided by the principles laid down in *United States* v. *Ballard*, 322 U. S. 78, may be undermined by making the application of the conclusive presumption of truth regarding all representations concerning matters of religious belief of the defendant in a mail fraud case depend upon the determination by the jury in a manner favorable to the defendant of a preliminary inquiry whether the representations in question are believed by the jury to be matters within the field of religion, as taught by the defendant.

The other questions presented herein are important questions of law arising in the trial of criminal cases in the Federal Courts which require settlement by this Court.

Protection of persons accused of felony from deprivation of a fair trial in the Federal Courts through gross

prejudice resulting from a grossly inflammable and prejudicial newspaper publication read by one of the jurors, asserting that the defendant had served a prison term for robbery (of which there was no evidence) and that by failing to take the witness stand he prevented the planned cross-examination by the prosecutor as to such alleged prison record, raises issues of civil liberty of fundamental importance, calling for the controlling guidance of this Court. The instant case is the first and only one we have seen in which the defendant was denied a new trial when a newspaper article of an admittedly grossly prejudicial and inflammatory nature was actually read by a juror during the trial and the matter was promptly brought to the attention of the trial judge by an appropriate motion of the defendant.

Instructions as to the presumption of innocence are given in practically all felony trials. To permit to stand, sanctioned by a decision of one of our most respected Courts of Appeal, a form of such instruction which in effect tells the jury that the presumption of innocence applies only in favor of innocent defendants would do incalculable harm to the prestige of Federal criminal justice. It would constitute retrogression to the kind of attitude toward persons accused of crime which it has taken English and American courts hundreds of years to overcome. It manifestly calls for supervision and settlement by this Court.

The decision of the Court of Appeals herein, affirming the denial of petitioner's motion to withdraw a juror and continue the case, because of the prejudice to the petitioner resulting from the reading of the admittedly grossly inflammatory newspaper article by one of the jurors, conflicts with the decisions in *Harrison* v. *United States*, 200 Fed. 662, by the Circuit Court of Appeals for the Sixth Circuit, in *Griffin* v. *United States*, 295 Fed. 437, by the

Circuit Court of Appeals for the Third Circuit, in *United States* v. *Montgomery*, 42 Fed. (2) 254, by Judge Woolsey, sitting in the District Court for the Southern District of New York, and in *United States* v. *Ogden*, 105 Fed. 371, by Judge McPherson, sitting in the District Court for the Eastern District of Pennsylvania.

The decision by the Circuit Court of Appeals, approving the instruction given herein relative to the presumption of innocence, conflicts with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Gomila* v. *United States*, 146 Fed. (2) 372.

Wherefore, it is respectfully submitted that the Petition for Writ of Certiorari should be allowed.

WALTER BACHRACH,
WALTER H. MOSES,
MORRIS SOLOMON,
H. G. SHEFFNER,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No.

HUGH GREER CARRUTHERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Grounds of Jurisdiction.

The order of the Circuit Court of Appeals was entered December 27, 1945. Jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. 347 (a). Stay of mandate pending this petition was entered January 2, 1946.

Concise Statement of the Case.

We respectfully refer the Court to pp. 6-9, *supra,* for a concise statement of the facts.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

(a) In holding that the charge to the jury set forth, *supra,* at page 2 did not violate the rights of petitioner under the First Amendment to the Constitution providing

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

(b) In holding that under the circumstances of this case, there was no abuse of discretion on the part of the trial judge in denying petitioner's motion to withdraw a juror and continue the case, on the ground that petitioner failed to show prejudice resulting to him from the publication of the admittedly inflammatory and prejudicial newspaper article, quoted at page 3, *supra,* and by the reading thereof by one of the jurors prior to verdict.

(c) In holding that the charge to the jury as to the presumption of innocence, quoted at page 4, *supra,* did not warrant a reversal of the conviction.

ARGUMENT.

I.

The Court committed reversible error in its charge to the jury in violating the right of petitioner to the free exercise of religion which was guaranteed to petitioner by the First Amendment to the Constitution.

Recognizing that the activities of petitioner charged in the indictment and pictured in the evidence concerned matters relating to his religious beliefs and involved the free exercise of his religion which had been guaranteed by the Constitution, the Court instructed the jury in the manner quoted at page 2, *supra.*

Before the jury were instructed and at the conclusion of all the evidence, petitioner had made a motion for a directed verdict of not guilty, based upon the ground that the indictment itself violated the petitioner's right to the free exercise of his religion guaranteed by the Constitution. (Rec. 480-481) Such motion was denied. (Rec. 482)

Immediately after the conclusion of the giving of the charge and in the presence of the jury, the following colloquy occurred between the court and petitioner's counsel: (Rec. 465-466)

> "Mr. Bachrach: 'My first request is that you give in substance the following: That the representations of the defendants or any of them concerning or relating to the subjects of breathing, silence and positions of persons during sleep are all matters within the field of religion as taught by the defendant Carruthers, and the truth or falsity of such representations, if any, may not be questioned in any way by the jury in arriving at its verdict in this case.'

> The Court: 'I will pass on that right now. I gave that with this modification. Where you say it is your suggestion that breathing, silence and position of persons during sleep are all matters within the field of religion, I have added—"if you believe that they are" —instead of the Court passing upon that question it is up to the jury.'
>
> Mr. Bachrach: 'To which I except'."

The religious nature of the Neological Foundation and that the activities of petitioner in directing it involved the teaching of religion were facts recognized throughout the proceedings. Thus paragraph 6 of count 1 of the indictment (which was incorporated in all succeeding counts) alleged the delivery by petitioner of radio programs and the sending by petitioner to members and prospective members of the Neological Foundation of literature relating to the purposes, activities and functions of the Foundation, giving

> "instruction in such subjects as Personal Development, The Omnipresent Universal Mind, Imagination, Will Power, * * * Creative Thinking, the Thibetan Science of Correct Breathing, the Occult Sciences, Telepathy, Clairvoyance, Hypnosis, Metempsychosis, Auto-suggestion, the Oriental Culture of the Thibetan, Himalayan, Chinese and Egyptian Secret Orders of the Great Lodge of Mystics. * * *" (Rec. 5)

Seventeen Government witnesses and forty-nine defense witnesses, totalling sixty-six altogether, testified that the Neological Foundation and the teachings of petitioner were of a religious character. (Rec. 190, 194, 196, 201, 213, 216, 218, 224, 227, 229, 231, 235, 238, 251, 266, 273, 281, 291, 294, 298, 303, 304, 308, 311, 313, 316, 318, 319, 320, 323, 325, 329, 330, 331, 336, 338, 341, 343, 346, 350, 354, 357, 360, 362, 363, 367, 368, 371, 372, 374, 376, 377, 378, 380, 384, 387, 388, 389, 391, 393, 410, 411, 412, 414, 419, 422.) No witness testified to the contrary.

The issue between the petitioner and the courts below is narrow. It involves the propriety of the action of the trial judge in leaving to the jury as an issue for its determination whether petitioner's representations relating to breathing, silence and position of persons during sleep were believed by the jurors to be matters within the field of religion as taught by petitioner.

The Court of Appeals finds the activities of petitioner to have been "so broad and so diversified at times as to reasonably raise the question whether his activities were in fact of a religious nature." (Rec. 511) Its opinion contains fragmentary quotations from petitioner's letters for the purpose of showing that petitioner's appeal was not religious and concludes that a real issue of fact existed as to whether petitioner was "claiming to advance a religious doctrine." (Rec. 511, 512)

The dictates of brevity herein confine us to a single illustration to demonstrate the error into which the Court of Appeals fell in basing its conclusion on this vital matter on fragmentary excerpts from petitioner's communications contained in the Government's brief. Thus the Court of Appeals quotes from petitioner's letter of May 28, 1942 (Gov. Ex. 30; Rec. 126-472) a portion of a sentence, the quoted portion reading: "* * * it is necessary to function as a Fraternity as well as an educational activity * * *." (Rec. 512) In the context of the balance of the letter the wholly immaterial nature of this portion of a sentence contained therein becomes manifest. We quote: (Rec. 128-129)

> "I have learned, during recent conversations, that some of our members, trying to explain Neology to others, fall short of the actual truth regarding this powerful philosophy. To say that it is the philosophy of Jesus Christ is not the whole truth. That Neology includes the interpretation of the Gospel taught by the Master is a sensible statement, but Neology also includes the modern interpretation of the Ancient Mys-

teries, or Wisdom of the Ages, outlined by the Master Thinkers, Scholars and Philosophers known to have possessed this great Truth in all ages.

The simple basic principle underlying Neology lies in man's ability to safely declare his At-one-ment with The Creative Principle, or God, or Jehovah, or The Almighty, or Allah, or The Universal Law of Cause and Effect, spiritually, because of the spiritual omnipresence of Omnipotence. The individual will designate his Deity according to his own interpretation of the Supreme Principle, but by whatever name, The Creator remains and continues unchanged, simply because He, or It, is The Unchangeable.

I am sure that many of our Fellows have very little understanding of the tremendous value they are securing in the Second Series. I know of no other teaching that has ever given the fundamentals underlying actual Lodge work, or the basic principles upon which every religion has been developed. It is absolutely necessary to have an understanding of the developments and teachings of the ancient Mysteries and Lodges before one can formulate a hypothesis for Personal Development for Self Mastery. How can one declare, " 'I' and The Father (Omnipotence) are One (because) 'I' am in Him, or It, and (for that very reason) He, or It, is In me" (because of the universal omnipresence of The Creator in spiritual form, or essence), until one understands the actual reason, or basis, for his conclusion and statement? But the fact that through understanding one can safely realize that a definite part of the universal spiritual omnipresence of Omnipotence Is, inherently and innately within him, makes that one reasonably certain that The Part within Must be the same in kind and quality as The Whole. * * *

Formulate the idea that 'I' Am . . . that 'I' Am I; that that 'I' is my inner Person, or Soul, or Spirit, . . . and a definite part of the omnipresent spirituality of Omnipotence omnipresent, and You have definitely identified Your True Self. You are the temple of God! Not because I have said so, but because you can prove that truth within yourself and your every day life and

affairs. The fact that you are consciously aware of an inner prompting (never from without—always within) to avoid wrong, or evil, or error, whenever you are about to act wrong . . . and always just before the act, would indicate that there is within you a Power and Intelligence that Knows, Sees and Understands all that is to be known, seen or understood,—and certainly more than you can consciously know. Call that Inner Intelligence by the name 'Spirit,' or 'I,' or 'God,' or 'Omnipotence,' or conscience, or Still Small Voice, and you cannot change It one iota; the fact remains that It is within.

Or see, Luke 17:20: for the admonition by Jesus, The Christ, or read the declaration by Paul, in 1st Corinthians, 6:19, and you have proof that Jesus, and Paul, as well as many others, knew, understood, lived and thought the Law of Cause and Effect."

See also letter of December 1st, 1942, Government's Exhibit 19 (R. 86-93), from which the Circuit Court of Appeals quotes in its opinion (Rec. 511).

Even if there were a real issue whether *all* of petitioner's activities in directing the affairs of the Neological Foundation were in fact of a religious nature, as the Circuit Court of Appeals finds, it does not follow that the representations as to breathing, silence and position of persons during sleep were not matters within the field of religion as taught by petitioner. In *United States* v. *Ballard*, 322 U.S. 78 at 83-84, this Court recognized that some representations could involve the free exercise of the defendant's religion even though others did not. The Court of Appeals herein itself recognized that "the subjects of 'breathing' and 'silence' find expression as religious practices in the ancient Yoga Creed," citing 29 Ency. Am. 638. (Rec. 511) The record is barren of any evidence showing that they were not also matters of religion, as taught by petitioner.

Even if a real issue existed as to the religious characte of representations on the specific subjects set forth in th instruction in question, we submit that it was the duty o the Court itself to determine that issue and to instruct th jury as to its determination as a matter of law. Only i that way could the guarantee of free exercise of his religio by petitioner set forth in the Constitution be performed b the Government and petitioner's reliance upon such guarantee not prove retroactively to have been a snare and a delusion, reliance by him upon which cost him his personal liberty.

This Court recognized in *United States* v. *Ballard*, 322 U. S. 78, the utter futility of expecting the ordinary juror to be able to pass with objectivity upon beliefs and other faiths which to him appear to constitute rank heresy. In fact, the history of religious persecution throughout recorded time explains the surrounding of the free exercise of religion by the protection of a Constitutional guarantee. The decision of this Court in *United States* v. *Ballard*, 322 U. S. 78, was based upon considerations of this character. In that case this Court said: (pp. 86-87)

> "The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. *But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.* The First Amendment does not select any one

> group or any one type of religion for preferred treatment. It puts them all in that position. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 87 L. Ed. 1292, 63 S. Ct. 870, 891, 146 A. L. R. 81. As stated in *Davis* v. *Beason,* 133 U. S. 333, 342, 33 L. Ed. 637, 639, 10 S. Ct. 299, 'With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.' " (Emphasis supplied.)

The mere fact that one preaching a religion engages in commercial activities to obtain money to finance his organization does not destroy or lessen his Constitutional protection. In *Murdock* v. *Pennsylvania,* 319 U. S. 105, this Court said: (p. 111)

> "* * * But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. *The Constitutional rights of those spreading their religious beliefs through the spoken and printed words are not to be gauged by standards governing retailers or wholesalers of books.* The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. *It is plain that a religious organization needs to remain a going concern. But an itinerant evangelist however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray or to sustain him.* Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." (Emphasis ours)

In conditioning the duty of the jury to accept as true petitioner's representations concerning the subjects of breath-

ing, silence and position of persons during sleep upon their preliminary finding that such representations involved matters within the field of religion as taught by petitioner the Court exposed petitioner to all the dangers against which the Constitutional guarantee and the decision in *United States* v. *Ballard,* 322 U. S. 78, were obviously intended to protect him.

The Prosecutor quickly discerned the opportunity presented to convert the proceedings into a heresy trial. Knowing that the Court was leaving to the jury as an issue of fact the determination of whether these representations constituted matters of religion, he deliberately referred to the "Neological nonsense that was spawned in the last few years." Objection to this argument was overruled by the Court who stated that the point was "saved." (Rec. 443) Such argument fitted perfectly into the examination by the Prosecutor of a Government witness (Rec. 251) and his cross examination of petitioner's witnesses who testified to the giving of instruction by petitioner upon the subjects of breathing, silence and position of persons during sleep. Therein the Prosecutor did his best to ridicule the teachings, the teacher, the witnesses and all other members of the Neological Foundation who believed in them and testified to the benefits which in their opinions were derived by them from such instruction. (Rec. 291, 292, 298, 300, 303, 309, 312, 314, 320, 329, 330, 333, 337, 344, 346, 356, 364, 366, 369, 379, 381, 383, 385, 391, 413, 416, 420.)

No judicial innovation is required to protect the Constitutional guarantee by requiring issues of this kind to be decided by the Court and by requiring the jury to be instructed upon the basis of the Court's decision. It is a matter of Hornbook law that the construction of written instruments, such as statutes, ordinances, constitutional provisions, private contracts and wills, present questions for determination by the Court as distinguished from the jury and that it is the duty of the Court to tell the jury

the status of such matters as a part of its charge. The enforcement of this principle of general application becomes vitally important when it is necessary to enable the Government realistically to perform the guarantee of the free exercise of religion found in the Constitution. The greater the pressure in the light of other facts and circumstances to depart from the protection which the Constitution accords to the religious beliefs of all persons and to their free exercise thereof, the more vital becomes the duty of the judge to give practical sanction to the Constitutional mandate.

Supervision by this Court of the administration of criminal justice in the Federal courts for the purpose of establishing and maintaining civilized standards of procedure and evidence is a function which it has recognized and exercised from the very beginning of its history. The principles laid down by it have not been restricted to those derived solely from the Constitution. Nevertheless, converting the dictates of the Constitution into realistic safeguards represents the exercise of this duty upon the highest plane. In *McNabb* v. *United States,* 318 U. S. 332 this Court expressed its views on this subject as follows: (pp. 340-341)

> "* * * the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so

basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our Federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the Federal criminal law in the Federal courts.

"The principles governing the admissibility of evidence in Federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, see *Nardone* v. *United States*, 308 U. S. 338, 341, 342, 84 L. ed. 307, 311, 312, 60 S. Ct. 266, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in Federal criminal prosecutions."

In a footnote at this point it adds: (p. 341, f.n. 6)

"The function of formulating rules of evidence in areas not governed by statute has always been one of the chief concerns of courts: 'The rules of evidence on which we practice today have mostly grown up at the hands of the judges; and, except as they may be really something more than rules of evidence, they may, in the main, properly enough be left to them to be modified and reshaped.' J. B. Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) pp. 530, 531."

This Court exercised this essential function in *U. S.* v. *Ballard*, 322 U. S. 78, in order to carry out the guaranty of the free exercise of religion set forth in the Constitution. The decision under review, viewed realistically, results in the substantial destruction of this safeguard by restoring to the jury, under the influence of argument by Government counsel, the opportunity to indulge religious intolerance and prejudice at the expense of persons accused of serious violations of the criminal law. We are confident that this Court will "hold the line."

In the Court of Appeals the Government argued that the giving of this instruction was harmless error because

of the "overwhelming evidence" of petitioner's guilt. No effort was made to demonstrate the truth of this *ipse dixit*. We deny it. This Court very recently, in *Weiler* v. *U. S.*, 323 U. S. 606, 89 L. Ed. 443, in reversing a conviction for perjury because of the refusal to give a proper instruction tendered by the defendant, answered such a contention as follows: (p. 611)

> "It is argued that this error did not prejudice the defendant. We cannot say that it did not. The jury convicted without being instructed that more than the testimony of a single witness was required to justify their verdict. This was no mere 'technical' error relating to the 'formalities and minutiae' of the trial. *Bruno* v. *United States, supra* (308 U. S. 293, 294, 84 L. Ed. 260, 261, 60 S. Ct. 198). We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility."

We respectfully submit that the giving of the instruction complained of deprived petitioner of the freedom of religion guaranteed to him by the Constitution.

II.

The Court committed reversible error in denying the motion made by petitioner to withdraw a juror and continue the case.

The taking of evidence at the trial ended at 2:30 P. M. Friday, February 16, 1945. (Rec. 437) The jury were then permitted to separate and go to their respective homes. (Rec. 439) On that evening there appeared in the Chicago Daily News the article entitled, "**Lama Dodges Questioning On Robbery**" set forth at p. 3, *supra*. When Court reconvened the following Monday morning petitioner's

counsel presented said motion to withdraw a juror and continue the case supported by affidavit of his counsel. The affidavit in part set forth the fact that the Chicago Daily News had a circulation in Chicago and its environs of upwards of 400,000 and was circulated for sale to the public in all of the communities in which the jurors lived and had probably been read by some or all of the jurors. (Rec. 437-439)

At the request of petitioner's counsel the Court thereupon asked the jurors collectively whether any of them had read an article concerning the case which appeared in the Chicago Daily News on Friday afternoon. (Rec. 439-444) Juror Vincent stated that he "might have" read it. (Rec. 440) The Court then stated to the jurors collectively:

> "If you have, I told you when you were being selected that the only evidence that you would consider would take place in this court room and which was admissible and was ruled on by the Court. If any of you have read anything, or of any of the defendants, that you did not hear in the court room by sworn testimony or documents you are to entirely disregard it, or anything that might have appeared before you get this case for your deliberation. Now I take it that you all understand it?" (Rec. 440)

Thereupon, at the request of petitioner's counsel each juror was polled separately. (Rec. 441-442) Juror Vincent, upon being polled, stated, "I remember it. I would like to see it again to be sure. I read the News. I probably read it." (Rec. 441) The following colloquy thereupon occurred between the Court and Juror Vincent:

> "The Court: Do you recall now if there was anything in the article, if you did read it, that was not in evidence in this case, in this courtroom?
>
> Juror Vincent: I read in the paper something. The rest I didn't hear. It was discussed after the case was dismissed Friday afternoon.

The Court: It was discussed by whom?

Juror Vincent: A motion was made by the defendants.

The Court: Yes.

Juror Vincent: That is what I read.

The Court: That is purely a legal question.

Juror Vincent: That is what I figured.

The Court: Anything else except the denial of that motion.

Juror Vincent: That is what I recall.

The Court: For your information, that is done in every case.

Juror Vincent: That is all I recall of the article.

The Court: That means whether it is a question of law for the Court or jury to pass upon. That is what you have reference to?

Juror Vincent: That is my understanding." (Rec. 441)

The Court thereupon denied the motion. (Rec. 442)

Juror Vincent, who acknowledged reading the Daily News article, was a member of the regular panel. In denying the motion the Court took under consideration substituting an alternate juror for him, but did not do so. (Rec. 453)

The Judge, the prosecutor, Mr. McGreal, and petitioner's counsel, Mr. Bachrach, all recognized that Juror Vincent had read the article. This clearly appears from the following colloquy:

"Mr. Bachrach: I would like to have the record show if your Honor please, in your polling of the jury, the juror who answered that he had read the Daily News item on Friday afternoon was a man of the regular panel and was not an alternate. May the record so show?

The Court: Yes.

Mr. McGreal: He stated his name.

Mr. Bachrach: I just wanted to make it clear.

* * *

The Court: Well, I take it from the fourteen I examined, *only one read an article* in the Daily News.

Mr. Bachrach: Yes.

The Court: *One juror did read it,* he said it was what took place after the closing of the case on Friday, and that is why I denied the motion. (Emphasis ours) (Rec. 453)

The Court of Appeals recognized the "inflammatory and prejudicial" character of the article and that its publication prior to verdict was both "improper and unethical." Nevertheless, it held that the denial of the motion was not an abuse of discretion, since in its opinion petitioner "failed to show prejudice resulting to him from the publication of the article," because the only juror who acknowledged reading the article stated that all he recalled of its contents was the reference to "the denial of a motion." (Rec. 514) According to the Court of Appeals, it could "only assume that the jury answered the trial court's inquiries truthfully" and upon that assumption it appeared that "Vincent's mind was in no way affected by what he had seen or read." (Rec. 515)

Examination of the article (p. 2, *supra*) discloses that its prejudicial character lies both in its reference to the fact that petitioner had served a prison term in New York State for highway robbery, which fact was not in evidence and reached the jury only through this article, and in its reference to the failure of petitioner to testify as a witness in his defense. Both the nature of the article and its timing were such as to insure petitioner's conviction by the jury.

Petitioner was not a witness at the trial and under 28 U. S. C., Sec. 632, he was not required to testify in his own

behalf and his failure to do so could not furnish the basis of any presumption against him.

The title of the article and paragraphs 1 and 3 contained the highly inflammatory and prejudicial matter rendering its publication and reading by Juror Vincent destructive of petitioner's right to a fair trial. Only paragraphs 2 and 4, which were inserted among these viciously improper matters, related to the motion for a directed verdict and its denial, which Juror Vincent acknowledged recalling from his reading of the article. That Juror Vincent could have read only the second and fourth paragraphs of the article and failed to read the heading and first and third paragraphs is so unlikely and improbable as to be disregarded. The set-up of the article confirms the recognized fact that he read it all.

Courts charged with the duty of seeing that persons accused of crime are given the fair trial to which they are entitled by law may not be so naïve as to accept as final and uncontrovertible the statements of a juror under the circumstances confronting Juror Vincent. He obviously knew that the reading of the article at all was improper and in violation of the admonishment of the Court with respect to his duties as a juror. (Rec. 170) He had every interest in answering the Court's questions in a manner to save face for himself. The very genuine concern of the trial judge over the effect of the incident upon the jury appears from his consideration of replacing Juror Vincent with an alternate juror. His failure to do so was due only to the fact that his power under the statutory provision providing for alternate jurors did not extend to substitution upon any such ground.

If the prosecutor had argued to the jury the prejudicial and inflammatory matters appearing in the newspaper article, a mistrial would have resulted. *Wilson* v. *U. S.*, 149 U. S. 60. If prior to deliberation upon their verdict one

of the jurors had been approached by a third person and been told the matters contained in said newspaper article, a mistrial would also have resulted.

Actually, one of the jurors had been informed through this newspaper article of these admittedly prejudicial matters and at the same time petitioner's counsel had no opportunity to deal specifically with the contents of the article before the jury. Obviously he would not request an instruction that the jury should not consider the newspaper statement that petitioner had been convicted of highway robbery. Telling the jury, as the Judge did, that they should consider only evidence introduced in the courtroom by way of testimony and exhibits was not by any means equivalent to a specific direction to disregard the highly prejudicial and inflammable matters contained in said article.

Moreover, no instruction could have wiped from the mind of Juror Vincent the contamination produced by reading such article. Once inoculated with the germ of prejudice it was impossible to render the virus innocuous.

The article was of such character as to arouse prejudice in anyone reading it. That its contents and the prejudice resulting from it were not communicated by Juror Vincent to the other jurors is at best a remote possibility. He was not asked whether he had communicated this "contraband" information to any of his fellow jurors between reading it on Friday afternoon and the polling of the jury the following Monday morning.

The case had been on trial for over three weeks. Petitioner had not taken the stand to testify in his own behalf although his two co-defendants had. (Rec. 394, 422) The jurors would naturally be curious why he did not testify. The newspaper article in question supplied the answer, namely, he did not testify because he did not want

to be cross-examined regarding a conviction of highway robbery. Supplying this information to the jury in this fashion was even more harmful than if the prosecutor had stated to the jury in his argument that the petitioner had been convicted of highway robbery, since under those circumstances the Court would have been able to admonish the jury specifically to disregard the statement and an opportunity would have been available to petitioner's counsel to suggest methods of overcoming the obvious prejudice resulting from such argument.

In no case which we have seen in which the Court has failed to declare a mistrial due to the prejudice resulting to the defendant in a serious criminal case from the publication during the trial of newspaper articles were the facts even remotely similar to those in the case at bar. All such cases are distinguishable because in them either (1) no juror had read the article complained of; or (2) the defendant himself had previously testified to the harmful matter appearing in the article; or (3) the material appearing in the article was not of the order of prejudice characterizing the newspaper article herein, which referred both to the failure of petitioner to testify in his own behalf and drew viciously prejudicial inferences therefrom and also made the statement that petitioner had served a penitentiary sentence for highway robbery, of which there was no evidence whatever before the jury.

On the other hand, several cases support petitioner's contention that the circumstances presented by this incident entitle him to a new trial.

In *United States* v. *Ogden*, 105 Fed. 371 (D. C., E. D. Pa.) a newspaper article containing many prejudicial statements, was published in a newspaper before the case was submitted to the jury, commenting upon the failure of the defendant to testify in his own behalf. In its opinion the court stated that the publishing of such comments not

only was a flagrant impropriety, but if those words had been communicated to the juror or had been contained in a letter addressed to him, there would have been declared an immediate mistrial.

Commenting on the article referring to the failure of the defendant to testify the court made these pertinent remarks (p. 374):

> " • • • in defiance of the constitutional provision that no man shall be obliged to testify against himself, attention was called to that fact, and it was asserted that the defendant did not venture to testify in his own behalf,—an assertion which neither judge nor counsel would have been permitted to make during the course of the trial. It is unnecessary to say that such comments upon a pending case violate the elementary rules that demand justice and fair play to a man accused of crime. Under our system of jurisprudence, at least, cases are tried upon evidence that is carefully scrutinized, and not upon insinuation and hearsay; and it is an attack upon the prisoner's constitutional rights to influence the jurors by presenting to their minds charges against him of which no evidence has been offered, or by urging upon the jurors, or suggesting to them, that the defendant is guilty, and ought to be convicted."

In the case of *Griffin* v. *United States* 295 Fed. (3 C.C.A.) 437, the defendant was on trial for conspiracy to defraud the United States. During the course of the trial the defense called the attention of the court to the fact that members of the jury had been seen reading some newspapers, particularly the Philadelphia Evening Ledger, of that date, which contained a front page article with a caption headline as follows: "Prosecutor Asserts Five Defendants Wanted to Turn State's Evidence—Refused." Counsel thereupon moved for a withdrawal of the juror which was refused and an exception was noted. It appeared that similar statements were published in other

newspapers in Philadelphia on other days during the progress of the trial. In reversing and remanding for new trial because of this error, Circuit Court Judge Davis, in the *Griffin* case, stated (at pages 439, 440):

> "It is the right of a defendant accused of crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence admitted according to law, and if facts prejudicial to him reach the jury otherwise, it is the duty of the trial judge to withdraw a juror and grant a new trial. * * *
>
> It is urged that there is no direct evidence that the jury read the newspaper reports. In the first place, it is admitted that the articles appeared on the front page of the newspapers, and there is no denial of the statement, made by counsel in his motion for the withdrawal of a juror, that 'members of the jury have been seen reading them.' Our opinion on this question was well expressed by Judge Acheson in the case of *Meyer, et al.* v. *Cadwalader,* 49 Fed. 32. * * *
>
> The defendants stoutly denied their guilt. It is not our duty or province to pass upon the merits of their defense, but it is our duty to see that it was presented to the jury free from bias or prejudice. Having reached the conclusion that it was not so presented, the judgment of the District Court is reversed, and a new trial granted." (Emphasis supplied.)

What occurred in the case at bar is comparable to the situation in the case of *United States* v. *Montgomery,* 42 F. (2d) 254, D.C. S.D.N.Y., decided by Judge Woolsey, where an article was published in a newspaper during the course of the trial, describing the defendant as a swindler, jail bird, disbarred lawyer, and ex-convict. At page 255, the Court said:

> "Will the orderly course of justice in this trial run the risk of being affected by any contraband information which may have reached the jury through the articles of which the defendants here complain?"

The jury in that case was polled and it appeared that four jurors had read the articles and of the four jurors upon being further interrogated three claimed that they could still deal with the case on the evidence, and the fourth, as the court said, "seemed to me to answer rather uncertainly and inconclusively." The court further said:

> "In addition to this impression as to this juryman, the fact, above mentioned, that one juror had asked another whether he had read the articles gave me an uneasy feeling that the objectionable statements would not be long unknown to the jurors who had not read them, and consequently that those statements might very well find a place alongside the evidence in the deliberations of the jury."

The court further said (p. 256):

> "In any event, however honest minded the jurors may be, such statements as were made in the objectionable articles would, I think, lurk in the background of their consciousness during their deliberations, and might, for example, cause them unconsciously to disregard the underlying requirement of a criminal case and to resolve any doubts they felt on the evidence against the defendants.
>
> Accurately to prophesy the influence and effect on the minds of jurors of what I have called the contraband information contained in these objectionable articles is, in my opinion, as impossible as it would be to foretell with any certainty the course of an infectious disease among them.
>
> Therefore I conclude that the defendants no longer have insured to them a fair trial solely on the evidence admitted therein to which, whether guilty or innocent, they are entitled."

Judge Woolsey then granted the motion for a mistrial. See also *Harrison* v. *U. S.*, 200 Fed. 662 (6 C.C.A.)

We submit that the circumstances surrounding this incident occurring during the trial of petitioner made manda-

tory the declaration of a mistrial pursuant to his motion made at the first opportunity and that its denial was an abuse of discretion. Permitting to stand convictions of serious felonies under the circumstances herein presented are not consistent with the standards of justice prevailing in our United States courts.

III.

The charge to the jury regarding the presumption of innocence constituted prejudicial error.

This charge is set forth at p. 4, *supra*. In effect the jury was told that the presumption of innocence applies only in favor of defendants innocent of the crime for which they are on trial. The great values to defendants of the presumption of innocence was stated by this Court in *Coffin* v. *U. S.*, 156 U. S. 432, in which the judgment of conviction was reversed because the Court had refused to charge relative to the presumption of innocence. This Court said: (pp. 3, 459)

> "**The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.** * * *
>
> p. 459 * * * **this presumption is an instrument of proof created by the law in favor of one accused whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created.** This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn." * * *
>
> * * To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by

instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them. In other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted. The evolution of the principle of the presumption of innocence and its resultant, the doctrine of reasonable doubt, makes more apparent the correctness of these views, and indicates the necessity of enforcing the one, in order that the other may continue to exist. Whilst Rome and the Mediaevalists taught that wherever doubt existed in a criminal case, acquittal must follow, the expounders of the common law, in their devotion to human liberty and individual rights, traced this doctrine of doubt to its true origin, the presumption of innocence, and rested it upon this enduring basis. **The inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime.**" (Emphasis ours.)

No argument is needed to demonstrate that the refusal to instruct regarding the presumption of innocence must necessarily be less prejudicial than an instruction which tells the jury that the presumption of innocence is enjoyed only by an accused who is not guilty of the criminal charge upon which he is being tried.

In *Gomila* v. *U. S.*, 146 F. 2d 372, the Circuit Court of Appeals for the Fifth Circuit held that such an instruction was error because the fact of guilt does not enter into the question as to whether the defendant was entitled to the presumption of innocence. It said: (p. 373)

> "The statement that the presumption of innocence 'was not intended, nor has it ever been intended, as extending an aid to one, who in fact is guilty, so that he may escape just punishment,' is not a correct statement of the law. The presumption of innocence applies alike to the guilty and to the innocent, and the

burden rests upon the Government throughout the trial to establish, by proof beyond a reasonable doubt, the guilt of the accused. Until guilt is established by such proof, the defendant is shielded by the presumption of innocence. *The fact of guilt does not enter into the application of the rule, the intent and purpose of which is to protect all persons coming before the courts charged with crime* until the presumption of innocence is overthrown by evidence establishing guilt beyond a reasonable doubt; and, where the evidence is purely circumstantial, to the exclusion of every reasonable hypothesis of innocence." (Emphasis supplied.)

The conviction in that case was reversed, the Court holding that all three errors assigned, one of which was based upon the improper form of an instruction similar to the one here complained of, were cumulatively sufficient to require reversal. (See 146 F. 2d at 376) The Court did not hold that the giving of the instruction in question would not have required a reversal, if the other errors had not also been present. No such question was presented. We submit it to be obvious that the giving of such instruction in itself deprives the defendant of a fair trial and entitles him to a new trial. The fact that the Court in that case regarded the giving of such instruction as highly prejudicial is made obvious by the consideration that it noticed such error and based its reversal thereon, even though no exception had been taken to the instruction at the time it was given.

In the instant case also no exception was taken to the giving of this particular instruction at the conclusion of the charge, but it was assigned as error in the Court of Appeals. (Rec. 495) The opinion of the Court of Appeals herein, however, did not deal with this alleged error beyond stating that it did not "warrant a reversal." (Rec. 515)

In view of the serious injury which undoubtedly resulted from the giving of such instruction, the failure to save an exception thereto should not deprive petitioner of the right to a fair trial which was denied him by such charge. *Gomila* v. *U. S.*, 146 F. 2d 372. *Lamento* v. *United States*, 8 Cir., 4 F. 2d 901, 904. *Benson* v. *United States*, 5 Cir., 112 F. 2d 422, 423. *Brasfield* v. *United States*, 272 U. S. 448, 450, 47 S. Ct. 135, 71 L. Ed. 345. *United States* v. *Atkinson*, 297 U. S. 157, 160, 56 S. Ct. 391, 80 L. Ed. 555.

CONCLUSION.

We respectfully submit that the questions raised in the Petition make manifest that petitioner has been convicted in a manner and under circumstances which are violative both of his Constitutional guarantee of the "free exercise of his religion" and of his right to a fair trial in accordance with the standards of justice and civilized procedure applicable in the trial of criminal cases in the Federal courts; that the petition for writ of certiorari should be granted, and, upon the granting thereof, that the judgment affirming the conviction should be reversed and the cause remanded to the District Court for a new trial.

Respectfully submitted,

WALTER BACHRACH,
WALTER H. MOSES,
MORRIS SOLOMON,
H. G. SHEFFNER,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 763

HUGH GREER CARRUTHERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO CITE ADDITIONAL AUTHORITY IN SUPPORT OF PETITION FOR CERTIORARI.

Now comes Hugh Greer Carruthers, Petitioner herein, by Walter Bachrach and Walter H. Moses, his attorneys, and moves this Honorable Court for leave to cite for its consideration in determining Petitioner's prayer for Certiorari herein, the decision of this Court in *Bollenbach* v. *U. S.*, No. 41 this term, opinion rendered January 28, 1946, after the filing of the Petition for Certiorari herein, and particularly the following portions of said opinion:

> "The petitioner was convicted of conspiring to violate the National Stolen Property Act. The Circuit Court of Appeals for the Second Circuit sustained the conviction. We brought the case here, 324 U.S. 837,

because it was submitted to the jury in a way that raised an important question in the administration of federal criminal justice. * * *

The question is whether he was properly convicted under the indictment. * * *

'In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.' *Quercia* v. *United States*, 289 U.S. 466, 469. 'The influence of the trial judge on the jury is necessarily and properly of great weight', *Starr* v. *United States*, 153 U.S. 614, 626, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge. * * *

In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.

Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must therefore be disregarded. 40 Stat. 1181, 28 U.S.C. par. 391. All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. The 'technical errors' against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions legal potency. See Taft, *Administration of Criminal Law* (1905) 15 Yale L.J., 15. Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harm-

less. *Bruno* v. *United States*, 308 U.S. 287, 293-94; *Weiler* v. *United States*, 323 U.S. 606, 611. From presuming too often all errors to be 'prejudicial' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Respectfully submitted,

WALTER BACHRACH,
WALTER H. MOSES,
Attorneys for Petitioner.

INDEX

CITATIONS

683792—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 763

HUGH GREER CARRUTHERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 503–515) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 27, 1945 (R. 516). The petition for a writ of certiorari was filed January 21, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial judge violated the First Amendment by charging the jury that the truth or falsity of petitioner's theories of breathing was not to be considered if found to be religious in character, where the indictment for mail fraud and fraudulent sale of securities was based on false representations of an intention to engage in business activities, and not upon the theories taught by petitioner.

2. Whether the trial judge abused his discretion by denying petitioner's motion for a mistrial based on newspaper publicity after the judge had ascertained by a poll of the jurors that only one juror had seen the article and that such juror had merely a vague recollection of its contents.

3. Whether it was reversible error to charge the jury that the presumption of innocence was not designed to enable one who was in fact guilty to escape.

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card,

package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

The Securities Act of May 27, 1933, c. 38 Title 1, 48 Stat. 74 (15 U. S. C. 77), provides in part:

SEC. 2. (1) [as amended, 48 Stat. 905] The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest

or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

* * * * *

SEC. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud * * *

* * * * *

SEC. 24. Any person who willfully violates any of the provisions of this title * * * shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

An indictment in 36 counts was returned against petitioner and two others in the United States District Court for the Eastern District of Illinois. Counts 1 to 9 charged the employment of a scheme to defraud in the sale of securities by the use of the mails in violation of Section 17 (a) of the Securities Act (R. 2–62); counts 10 to 35 charged use of the mails in execution of the scheme to defraud in violation of Section 215 of the Criminal Code (R. 62–141), and count 36 charged a conspiracy to violate the mail fraud statute and the fraud provisions of the Securi-

ties Act. Counts 5 and 9 were dismissed at the close of the Government's case (R. 290, 456). Petitioner was convicted on the remaining 34 counts (R. 487) and was sentenced generally to imprisonment for five years (R. 488–489).[1] On appeal, the judgment against petitioner was affirmed (R. 516).

The scheme to defraud is set forth in detail in count 1 of the indictment (R. 4–18). In substance it alleged that petitioner organized and controlled an unincorporated association known as the Neological Foundation; that by means of public lectures and radio broadcasts on economic development and spiritual improvement he induced persons to become members of the association and pay dues; that pamphlets, lessons and literature on various subjects were sent to members and prospective members of the Foundation; that petitioner represented himself as a person with numerous scholastic degrees and as an unusually successful businessman; that he purported to have the foundation engage in business activi-

[1] The court granted a motion for a verdict of acquittal on behalf of the two codefendants who were employed by petitioner (R. 470, 487). It is unnecessary to consider whether the acquittal of the codefendants, necessitates reversal of petitioner's conviction on the conspiracy count, since any one of the substantive counts supports the sentence imposed. The conspiracy count did charge that petitioner conspired with the two other defendants named in the indictment and with persons unknown (R. 141–142).

ties and solicited investments therein by members; that he represented that he had acquired a formula for a hair shampoo known as Nan-Gene and for a laxative known as Happy Hearts and solicited investments in the development thereof, promising to pay interest at 6% per annum plus a bonus of 4%; that he engaged in the sale and delivery of securities in return for such investments. The indictment further alleged that, as part of the scheme to defraud, petitioner made a number of false representations, including statements that investors in Nan-Gene, Happy Hearts, and the Foundation would be paid interest at 6% per annum plus a bonus of 4%, whereas petitioner did not intend to and did not engage in business activities and knew that the Foundation had operated at a loss and could not pay interest. It also alleged that petitioner represented that he was a wealthy man and that he would employ the money loaned to him to expand the activities of the Foundation, whereas he appropriated a substantial amount of the money so invested for his personal use; that he falsely represented that he was the holder of numerous scholastic degrees and was a licensed physician; that he told members he had acquired a substantial tract of land in Bangor, Michigan to which members could retire, whereas petitioner did not intend to and did not acquire land and buildings suitable as living quarters.

The evidence for the Government as to the scheme to defraud may be summarized as follows:[2]

In 1935 petitioner gave courses of lectures in Pittsburgh, Pennsylvania under the name of the Neological Foundation (R. 193, 203, 251). He told his followers there that he was of noble English parentage and had been a flying parson during World War I; that he had been injured and had cured himself by the methods he taught (R. 251). He induced two of his followers there to invest $2100 and $2050, respectively, for the expansion of the Foundation, promising them 10% interest in return (R. 193–194, 251). He made no payment on the first loan (R. 194), and paid only $1,000 on the second (R. 252).

In 1936 petitioner transferred his headquarters to Chicago (R. 194, 203, 252). There he conducted radio programs by means of which he attracted followers (R. 188, 192, 197, 205, 208, 209, 225, 231, 233, 236, 253, 255, 264, 265, 279). Persons interested became members of the Neological Foundation, paying dues of $2 per month (R. 192, 209, 229). The Foundation grew from a membership of 200 in 1938 to a membership of 4,000 (R. 227, 229, 397). Petitioner would address the

[2] No question is raised here as to the sufficiency of the evidence to establish the use of the mails in execution of the scheme. There was abundant evidence that petitioner made extensive use of the mails (R. 189, 191, 198, 199, 201, 203, 205, 208, 210, 215, 224, 225–226, 261).

683792—46——2

membership at meetings in Chicago on his philosophy of self-betterment and would also urge members to invest money with him (R. 189, 191, 208, 209, 228, 279, 281). He represented that he came of a prominent English family (R. 221, 231); that he had studied for years in a lamasery in Thibet (R. 221, 231, 257, 260, 270, 274, 282), and that he had been a flying parson during World War I and had been blinded, but had cured himself (R. 221, 231, 280, 282); that he had numerous scholastic degrees, including that of doctor of medicine (R. 189, 227–228, 257, 260, 268, 270, 274, 280, 282). Petitioner's attorney stipulated at the trial that, prior to 1934, petitioner was known under the name of Henry J. Boerum and that, except for a period in the latter part of 1919 and 1920, he was never out of the territorial boundaries of the United States (R. 214). Petitioner was fifteen years old when he attended the fourth grade of the public school in Brooklyn, New York (R. 246), and worked in the post office for a period of nine years (R. 247, 259).

Petitioner represented that he was independently wealthy and drew no salary from the Foundation (R. 196, 211, 220, 228, 244, 260, 272), that those who invested money in the Foundation would receive interest at 6% plus a bonus of 4% (R. 208, 228, 244, 253, 274), and that investment in the Foundation was a very safe one (R. 220, 222, 234).

In 1938 petitioner stated that he had acquired a formula for a shampoo known as Nan-Gene (R. 191). He said that one element of the shampoo was an Indian soap bark tree which he had seen used in India, and that he could obtain that material through a New York importer (R. 279, 282). He promised that those who invested in the product would receive interest at 6% plus a bonus at 4% per annum, and, according to some witnesses, would in addition be paid a 50% dividend within three years (R. 187, 191, 195–196, 211, 216, 218, 231, 248, 255, 277, 279). He also said that investors could get their money back at any time (R. 190, 196, 208, 218). He stated that he had a separate fund on deposit to assure protection of the investment (R. 212; see also R. 187, 189, 237, 248). A few sample bottles of Nan-Gene were displayed and sold to members (R. 187, 191, 218; see R. 239–241).

In 1939 he told the membership that the formula had proved unsatisfactory, and that instead of Nan-Gene a laxative known as Happy Hearts would be sold and the investment transferred to that product (R. 187, 191, 211, 218, 223, 242, 278). He again promised that investors would receive interest at 6% plus a 4% bonus (R. 215, 216, 270). Happy Hearts was never manufactured (R. 187, 218, 403).

A number of witnesses testified that they had made investments for the exploitation of these

products (R. 195–196, 206, 212, 215, 216, 231, 234, 237, 242, 248, 255, 270, 272, 277) or had invested in the Foundation's activities (R. 197, 199, 208, 210, 219, 222, 234, 244, 253, 261, 265, 274). Most of these people either received no payments whatsoever (R. 197, 210, 218, 222, 254, 272) or received back only a part of their original investment (R. 199, 206, 208, 217, 225, 231, 235, 237, 244, 248, 265, 270, 276, 277). The money that was paid back to the lenders came from funds loaned by others (R. 285). As of December 1943, the Foundation owed about $180,000 (R. 283, 285). Petitioner withdrew substantial funds from the Foundation for his personal use (R. 227; Gov. Ex. 210–212, R. 288–289).

Petitioner also conducted a medical clinic where persons were treated for a fee (R. 189, 229, 237) and set up, as a consulting psychologist, one Catherine Jones who had no degree and whose formal education consisted of two years of normal school (R. 189, 219–220).

The building acquired by petitioner in Bangor, Michigan, which was represented as being a haven for members of the Foundation (R. 264–265), consisted of a house used for offices which had no living quarters (R. 262, 372–373, 433).

ARGUMENT

1. As shown by the Statement, *supra,* the indictment in this case was based wholly upon petitioner's business activities and not on his teachings.

The scheme to defraud alleged was in essence one to obtain loans by promises of extravagant returns. The false representations set forth in the indictment did not relate to the ideas which petitioner taught, but to his claims of wealth, education and experience, and his unfounded guarantees of future income resulting from purported commercial business activities. The direct testimony of the government witnesses was almost exclusively confined to an account of their business dealings with petitioner. Only one government witness, an early follower in Pittsburgh, testified on direct examination to the details of petitioner's theories, and her testimony in this respect was brief and merely incidental to an account of her loans to petitioner (R. 251). On cross-examination by petitioner's counsel, government witnesses gave varying answers describing petitioner's teachings as dealing with religion, philosophy, or economic self-betterment (e. g. R. 190, 193, 195, 196, 213, 216, 238, 243–244, 255, 260, 273). One witness testified that at the beginning the meetings were not religious, but that later they were converted into religious meetings (R. 239; see also R. 231).

The defense called more than 50 witnesses, many of whom testified that petitioner's teachings were of a religious nature (R. 291, 294, 304, 308, 311, 313, 318, 320, 331, 336, 338, 341, 343, 346, 350, 354, 357, 360, 363, 367, 368, 371, 372, 374, 376,

377, 378, 380, 384, 387, 388, 391, 393, 410, 411, 419). Thirteen of these witnesses testified during cross-examination as to the nature of petitioner's teachings on breathing and on silence (R. 291–292, 298, 310, 320–321, 329–330, 344–345, 347, 356, 365, 369–370, 381–383, 391–392, 413), and seven others testified that they did not study or were not interested in the subject of breathing (R. 300, 303, 323, 333, 379, 416, 420). In his summation to the jury the prosecutor stated (R. 450–451):

> The position of the Government in this case is this man Boerum attempted to defraud a group of innocent people by false misrepresentation, pretenses and promises. We are not trying religion. We don't intend to try religion. If he or any other person in this world desires to believe that it is his religion to breathe out of the left nostril, to breathe or inhale through the left nostril and exhale through the right, and he thinks that is his religion, let him believe it if he wants to. If he wants to go into silence or science of relaxation or prayer, let him believe it, we won't interfere with him, that is his right. If he wants to believe some of the other things that had been stated here, let him believe them. But when he comes out to these poor innocent people and he falsely represents to them as he did in the golden book, Government's Exhibit 184, that he has a master of science degree, that he is a Doctor of Divinity, that he has a Ph. degree, that he is a F. R. S., and

F. N. S., and he is a man of wide experience and tells them that he studied for more than twenty-one years in the Lamaseries of Changu Narain, in Khatmandu, Nepal; and of Kum Bum on the shore of the Great Blue Lake in Southeast Thibet—when he tells them that his life has been devoted to the betterment of others, as well as an example of results obtained by consistent application of the wisdom of the age—and when he tells them that he wants to borrow their money and he will pay them 6 percent interest and 4 percent bonus and 50 percent at the end of three years, then I say to you, ladies and gentlemen of the jury, it then becomes our duty to step in * * *.

The trial judge instructed the jury as follows (R. 455–456):

The first amendment of the constitution of the United States provides as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

This provision of the constitution as a matter of law, protects the defendants, and each of them, from any inquiry by you into the truth or falsity of any of the religious beliefs, or doctrines, or representations made by the defendants, or any of them, which dealt with such beliefs or doctrines. In the consideration of the question of the guilt or innocence of the defendants in this case you must assume that any and all representations made by the defendants,

> or any of them, concerning matters pertaining to their religious beliefs or doctrines, were true at the time they were made, and this is so, irrespective as to whether such representations were written or oral, or partly written and partly oral, or merely based upon inferences which you may draw from printed or written documents in evidence.
>
> You are further instructed that representations of the defendants, or any of them, concerning or relating to the subjects of breathing, silence, and position of persons during sleep, if you believe that they are matters within the field of religion, as taught by the defendant Carruthers, and the truth or falsity of such representations, if any, may not be questioned in any way by you in arriving at your verdict in this case.

He then summarized the indictment at length (R. 457–460) and instructed the jury that (R. 461–462):

> The burden in this case is upon the Government to prove beyond a reasonable doubt that the alleged false pretenses, representations and promises were made as charged in the indictment. It is not, however, necessary that the Government should prove all of the pretenses, representations and promises charged, but it is essential that one or more of them must be proved beyond a reasonable doubt, and that the scheme to defraud charged in the indict-

ment should be substantially established by the evidence.

Petitioner contends (Pet. 2–3, 10–11, 16, 17–27) that the instruction relating to his theories of breathing and silence violated the First Amendment in that it allowed the jury to determine whether his ideas were of a religious character. However, as the circuit court of appeals pointed out (R. 511–512), there was a real question under the evidence in this case as to whether this part of petitioner's teaching was advanced as religious doctrine. In any event, it is clear that the instruction has none of the significance which petitioner attempts to attach to it. The indictment, the evidence, the prosecutor's summation, and the judge's charge made it abundantly clear to the jury that petitioner was being tried for his business activities alone and not for his preachings. The instruction complained of came before the judge summarized the indictment and, read in its context, in effect eliminated the question of petitioner's theories as an issue in the case. The jury was specifically told that it must find a scheme substantially as alleged in the indictment and at least some of the false representations set forth in the indictment, all of which related to commercial matters. Hence, in order to convict, the jury had to find and, on ample evidence, it did find, that petitioner had devised a scheme and made false representations which clearly fall outside of

the field of religion or philosophy. Petitioner was convicted, not for what he taught, but for practicing ordinary mundane fraud in commercial transactions.

2. The presentation of evidence in the case concluded in the afternoon of Friday, February 16, 1945, and the jurors were allowed to go home over the week end. That evening an article relating to the trial appeared in the Chicago Daily News. (R. 438–439.)[3] On Monday morning, petitioner's

[3] The article was as follows:

"Lama Dodges Questioning on Robbery.

The Kum Bum Lama dodged the witness stand in his Federal Court fraud trial this afternoon, and averted a showup of his career as highway robber before he grew a beard and named himself Dr. Hugh Greer Carruthers.

The defense rested, and then Judge Philip L. Sullivan denied a defense motion for a directed verdict of not guilty offered for Carruthers. The judge held in abeyance, until he receives the jury's verdict, motions for directed acquittal of the other defendants, Evelyn Kroell and Mary Morel.

Prosecutor Francis J. McGreal had planned to put into the record, in cross-examination, the fact that Carruthers, under his real name of Henry Boerum, Jr., served a prison term in New York state for highway robbery.

The failure of Carruthers to testify prevented this.

The defense attorneys, Walter Bachrach and Edward Hess asked a directed acquittal on argument that Carruthers' Neological Foundation was a religion, like the 'I am' cult, whose sponsors won in the high courts.

The Defense had conceded in court that the 'doctor' was really only Henry, a postal clerk from Brooklyn, and had not been educated as a lama in Tibet, but had merely learned the alphabet and some words as a fifth grade pupil in a Brooklyn public school.

Closing arguments will begin Monday."

counsel called this fact to the attention of the court and moved for a mistrial (R. 437–439). At the request of defense counsel, the judge asked the jurors collectively whether they had read the article published in the News. One juror, Vincent, replied "I might have. I don't remember it unless I saw it again." The trial judge then reminded the jury that he had previously told them that the only evidence they were to consider was that presented in the court room, and that they were to disregard anything that they might have read. (R. 440.) Each juror was then asked individually whether he had read the article, and all except Vincent stated that they had not seen it (R. 441–442). The following colloquy took place between Vincent and the court (R. 441):

> Juror VINCENT. I remember it. I would like to see it again, to be sure. I read the News. I probably read it.
>
> The COURT. Do you recall now if there was anything in the article, if you did read it, that was not in evidence in this case, in this courtroom?
>
> Juror VINCENT. I read in the paper something. The rest I didn't hear. It was discussed after the case was dismissed Friday afternoon.
>
> The COURT. It was discussed by whom?
>
> Juror VINCENT. A motion was made by the defendants.
>
> The COURT. Yes.
>
> Juror VINCENT. That is what I read.

The COURT. That is purely a legal question.

Juror VINCENT. That is what I figured.

The COURT. Anything else except the denial of that motion.

Juror VINCENT. That is what I recall.

The COURT. For your information, that is done in every case.

Juror VINCENT. That is all I recall of the article.

The COURT. That means whether it is a question of law for the Court or jury to pass upon. That is what you have reference to?

Juror VINCENT. That is my understanding.

The trial judge denied the motion for a mistrial (R. 442).[4] At the opening of his charge to the jury, the judge again instructed them that they were to consider only the evidence presented in open court and were not to be influenced by any articles which might have appeared in a newspaper (R. 454).

It is clear that the trial judge, in passing on petitioner's motion for a mistrial, acted with care and deliberation, and denied the motion only after his examination of the individual jurors had convinced him that petitioner had not been prejudiced. There is thus no merit in petitioner's con-

[4] The judge considered substituting an alternate juror for Vincent but concluded that such action would not be proper under the statute (R. 453).

tention (Pet. 3–4, 11–12, 16, 27–37) that the denial of his motion constituted an abuse of discretion. The cases relied upon by petitioner (Pet. 33–36) are distinguishable in that it was affirmatively shown that a number of jurors had read the offending articles. Here, only one juror had seen the article in question, and he had merely a vague recollection of its contents. Under the circumstances we think that the circuit court of appeals properly held that there was no abuse of discretion on the part of the trial judge in denying petitioner's motion for a mistrial (R. 515). See *United States* v. *Keegan*, 141 F. 2d 248, 258 (C. C. A. 2), reversed on other grounds, 325 U. S. 478; *Welch* v. *United States*, 135 F. 2d 465 (App. D. C.), certiorari denied, 319 U. S. 769; *Shushan* v. *United States*, 117 F. 2d 110, 116 (C. C. A. 5), certiorari denied, 313 U. S. 574; *Beard* v. *United States*, 82 F. 2d 837, 844 (App. D. C.); *Klose* v. *United States*, 49 F. 2d 177, 182 (C. C. A. 8); *Stunz* v. *United States*, 27 F. 2d 575 (C. C. A. 8); *McHenry* v. *United States*, 276 Fed. 761, 764 (App. D. C.); cf. *Holt* v. *United States*, 218 U. S. 245, 250–251.

3. The trial judge gave the following instruction on the presumption of innocence (R. 454):

> * * * The defendants under the law are presumed to be innocent of the charge. This presumption remains throughout the trial with the defendants until you have been satisfied by the evidence in the case

> beyond all reasonable doubt of the guilt of the defendants or either of them.
>
> This presumption of innocence is not intended to aid anyone who is in fact guilty of crime to escape, but is a humane provision of the law intended, so far as human agencies can, to prevent an innocent person from being convicted.

No exception was taken to this portion of the charge, but petitioner now assigns as error the statement that the presumption was not designed to protect one who was in fact guilty (Pet. 4, 12, 13, 16, 37–40). He relies on *Gomila* v. *United States,* 146 F. 2d 372, in which the Circuit Court of Appeals for the Fifth Circuit reversed a conviction in a case which it considered doubtful on the evidence because of an accumulation of errors, including a charge similar to the one given here. That the court did not consider the mere giving of such instruction ground for reversal is shown by its refusal to reverse the conviction in another case in which the same statement was made. *Pasqua* v. *United States,* 146 F. 2d 522 (C. C. A. 5), certiorari denied, 325 U. S. 855 (see Government's brief in opposition in that case, No. 1047, October Term, 1944, pp. 9–13). It is doubtful that the criticism of the charge in the *Gomila* case is sound. We see nothing prejudicial to a defendant in the statement that the presumption of innocence is not designed to protect one who is shown beyond a reasonable doubt to be

guilty, particularly where, as here, the charge is followed by a definition of reasonable doubt (R. 454). In essence, it is not very different from the charge approved by this Court in *Allen* v. *United States,* 164 U. S. 492, 500, a capital case. See also, *Boehm* v. *United States,* 123 F. 2d 791, 811 (C. C. A. 8), certiorari denied, 315 U. S. 800. In any event, it is clearly not the kind of error which may properly be raised for the first time on appeal. *Pasqua* v. *United States, supra.* Cf. *Johnson* v. *United States,* 318 U. S. 189, 201; *Holmgren* v. *United States,* 217 U. S. 509, 523–524; *Allis* v. *United States,* 155 U. S. 117, 122.

CONCLUSION

The decision below is correct and the case presents no real conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

FEBRUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 763

HUGH GREER CARRUTHERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

WALTER BACHRACH,
WALTER H. MOSES,
Attorneys for Petitioner,
231 South LaSalle Street,
Chicago 4, Illinois.

PRINTED BY CHICAGO LAW PRINTING CO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 763

HUGH GREER CARRUTHERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States.

Now comes Petitioner, Hugh Greer Carruthers, and respectfully prays for a rehearing of his Petition for Writ of Certiorari.

By the Petition for Certiorari this Court was informed that an important constitutional question was involved which should be decided by it. That question was: did the submission to a jury in a mail fraud case, *as an issue of fact,* of the question whether representations of certain matters involving the teachings of the petitioner relating to breathing, silence (meditation and prayer) and posi-

tions of persons in sleep, come within the field of religion.[1]

The Petition for Certiorari pointed out the indictment charged that *it was a part of the alleged scheme* to defraud in connection with the sale of securities to members and prospective members of defendant's organization The Neological Foundation to "create and organize clubs, associations, groups and classes within and among the members of the said Neological Foundation, and among the persons intended to be defrauded, for the purpose of further and more detailed study and benefit *from the teachings, philosophy, and creed* of the said Neological Foundation and the said defendants (including petitioner)" (Pet. for Cert. pp. 7, 18) (Rec. 7).

The Petition for Certiorari also pointed out that the prosecutor, in order to prove the allegations of the indictment brought out by the examination of one of the government's own witnesses, and by cross-examination of numerous witnesses for the petitioner, that his teachings included certain matters with respect to such breathing, silence and positions of persons in sleep, without attempting to establish the falsity of any of such representations concerning such matters; and that in his argument to the jury, knowing that the Court was going to submit to the jury the question whether representations with respect to such matters came within the field of religion the prosecutor referred to "Neological nonsense that was spawned in the last few years." When exception was made to such argument the Court overruled it stating that the point was saved (R. 443, Pet. for Cert. p. 24).

---

[1] The question was properly raised in the trial court by exceptions to the charge to the jury (R. 455-456) and by a specific request that the jury be instructed that the matters referred to came within the field of religion (R. 465-466).

The Petition also pointed out the Court's charge to the jury in which he recognized that a question involving the right to the free exercise of petitioner's religion was involved in the case by instructing the jury in an abstract way that any representations of matters pertaining to religion were to be accepted as true by the jury, but in dealing with the particular subject matter of breathing, silence and positions of persons in sleep he instructed the jury that it was *for them,* to determine whether such matters came within the field of religion (Pet. for Cert. pp. 2 and 3).

The Petition further pointed out that upon the conclusion of the charge petitioner's counsel specifically requested the Court to charge as a matter of law that the representations of the petitioner concerning or relating to the subjects of breathing, silence and positions of persons during sleep were matters within the field of religion as taught by him, and that the truth or falsity of such representations could not be questioned in any way by the jury in arriving at its verdict in the case. This the court refused to do and stated that such matters were being submitted to the jury *as a question of fact* (R. 465-466, Pet. for Cert. p. 18). The petitioner was tried, as the record shows, for his religious beliefs and his exercise thereof, by the making of such representations, along with other charges.

The Government's brief in Opposition to the Petition for the Writ of Certiorari, in dealing with the religious question, challenged neither the correctness of the statements of law made in the petition nor the importance of the question presented. The Government met petitioner's contention by presenting its argument in such a way as to induce belief by this Court that there was no record basis for a consideration of the question whether petitioner had been deprived of his right to the free exercise of his

religion guaranteed to him by the First Amendment by asserting "the indictment, the evidence, the prosecutor's summation and the Judge's charge made it abundantly clear to the jury that petitioner was being tried for his business activities alone and not for his preachings" (Government's brief in Opposition, p. 15). It further sought to induce such belief that there was no record basis for a consideration of the question whether petitioner had been deprived of his right to the free exercise of his religion guaranteed to him by the First Amendment by asserting that "petitioner was convicted, not for what he taught, but for practicing ordinary mundane fraud in commercial transactions" (Government's brief in Opposition, p. 16). Thus by the Government's brief in opposition the record under review was made to *appear,* to this Court, different from the way it appeared to the trial judge, the jury and the Circuit Court of Appeals. In its brief filed in the Circuit Court of Appeals the Government took an entirely different position from the one which it presented to this Court in its brief in opposition to the Petition for certiorari. In the brief filed by it in the Court of Appeals, the Government took the position that excerpts from certain letters written by the petitioner to his members indicated that he did not believe "that the Neological Foundation was a religious organization and that he was teaching religious subjects" (Government brief CCA, p. 34). The government in that brief sought to support its contention by referring to excerpts from certain letters of the petitioner to members of his organization which it was contended indicated that he did not believe he was teaching a religion or operating a religious society (Government's brief, CCA, pp. 35-36). In that same brief the government took the position *"it is clear that the jury could not possibly infer (from the instruction in question) that they were authorized to determine as a question of fact any part of the evidence which*

bordered on religious belief or doctrine" (Government brief, CCA, p. 38). The Circuit Court of Appeals in its decision adopted the contention of the government's brief that the excerpts from the letters in question were sufficient to raise a question of fact as to whether the representations of the defendant concerning the matters above referred to constituted religion as taught by petitioner. It was upon this basis that the Circuit Court of Appeals held the trial judge did not err in his charge. (*U. S.* v. *Carruthers,* 152 Fed. (2) 512, 517, 518.) In other words the Court of Appeals reached its conclusion that the rulings of the trial court in this matter were correct by stating that there was some evidence to show that the petitioner was not making a religious appeal to his members (Rec. 511, 512, 152 Fed. (2) 517). In our Petition for Certiorari we pointed out (p. 19) that the letters from which the excerpts were taken did not justify the conclusion reached by the Court of Appeals. We further pointed out (p. 21) that even if there were a real issue whether *all* of petitioner's activities in directing the affairs of the Neological Foundation were in fact of a religious nature, it does not follow that the representations as to breathing, silence and positions of persons during sleep were not matters within the field of religion as taught by petitioner (Pet. for Cert. p. 21).

The Government's brief in opposition in this Court abandoned the argument made by it in the Circuit Court of Appeals and in effect repudiated the position taken by the Circuit Court of Appeals in its opinion simply by presenting the appearance of a record which did not in fact exist.

Conceding for the sake of argument, that the record under review contained sufficient evidence from which a jury might have found that the defendant had been guilty of commercial fraud in the sale of securities, nevertheless

petitioner was entitled to have his guilt or innocence of such fraud determined by the jury unaffected by the finding or belief of the jury that misrepresentations in the religious field were false or fraudulent. *U. S.* v. *Ballard*, 322 U. S. 78.

We submit that even with the element of commercial fraud involved in the case, petitioner was entitled to invoke the constitutional guarantee of his right to religious freedom contained in the First Amendment, as to those teachings claimed to have been a part of the alleged scheme to defraud and upon evidence of which the government sought to obtain a conviction. To argue, as the government has done in its brief in opposition, that "petitioner was convicted, not for what he taught, but for practicing ordinary mundane fraud in commercial transactions" (Government brief in opposition, p. 16) is simply a different method of stating that because the record would sustain a verdict of guilty, therefore any errors committed cannot be said to be prejudicial. The recent holding of this Court in *Bollenbach* v. *United States*, No. 41, October Term 1945, opinion rendered January 28, 1946, is sufficient authority for the proposition that the contention of the government that the petitioner was convicted not for what he taught but for practicing ordinary mundane fraud in commercial transactions, is wholly without merit. We submit that neither the belief of government counsel nor of appellate judges, in the guilt of petitioner however justifiably engendered by the dead record, can be substituted for the ascertainment of guilt by a jury under appropriate judicial guidance. There is no way of telling from an examination of the dead record in this case whether or not the jury convicted petitioner because it believed that the representations made by him concerning breathing, silence and positions of persons in sleep, did not come within the field of religion and were false. The trial judge told the jury that "The burden in

this case is upon the Government to prove beyond a reasonable doubt that the alleged false pretenses, representations and promises were made as charged in the indictment. *It is not, however, necessary that the Government should prove all of the pretenses, representations and promises charged, but it is essential that one or more of them must be proved beyond a reasonable doubt,* and that the scheme to defraud charged in the indictment should be substantially established by the evidence" (R. 461). In view of this instruction the jury might well have convicted petitioner upon its belief that the teachings with respect to breathing, silence and positions of persons in sleep did not come within the field of religion and that such representations were false.

In the matter of petitioner's teachings of Yogi Doctrines regarding breathing, silence and positions in sleeping, at least no problem should exist as to their classification within the field of religion. Their very unorthodox character and their peculiarly compelling attraction to the followers of petitioner are demonstrative of the element of faith, fundamental to any concept of religion. (See 29 Encyclopedia Americana, p. 638.)

In a portion of Montesquieu's famous Persian letters, it is written that a man prayed to God daily, "Lord," he said, "I do not understand any of those discussions that are carried on without end regarding Thee; I would serve Thee according to Thy Will; but each man whom I consult would have me serve Thee according to his" (Letter XLVI, Usbek to Rhedi, at Venice, Universal Classic Library, 1901). It is conceivable that a jury composed of Mohammedans whose religious philosophy is such that all other believers are infidels and non-religious, might conclude that petitioner's teachings here were clearly not religious in character because of his favorable references to Jesus Christ and Christianity. This hypothetical rea-

soning would operate on the theory that such teachings as petitioner's could not be religious views, since not in accord with those of the jury.

Your Petitioner regards it his duty to himself, to some 256 religious denominations in the United States, to 67,327,719 American churchgoers and to their religious leaders, presently engaged in teaching their respective and dissimilar views of the Good Life, to bring before this Court a question of such vast importance that millions of Americans are affected in a controversy involving an interpretation of the First Amendment to the Constitution.[1] Therefore, your petitioner respectfully asks for further consideration by this Court of the denial of the petition for a writ of certiorari.

We respectfully submit that because government's brief in opposition to the petition for certiorari made it appear, whereas the contrary is the fact, that there was no question presented by the record involving a denial of petitioner's constitutional right to religious freedom, a rehearing should be granted and the petition for certiorari allowed.

Respectfully submitted,

WALTER BACHRACH,
WALTER H. MOSES,
Attorneys for Petitioner.

I do hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay.

WALTER BACHRACH.

---

[1] World Almanac and Book of Facts, 1945 at p. 366, published by New York World Telegraph.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 763

HUGH GREER CARRUTHERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

SECOND PETITION FOR REHEARING OF PETITION FOR CERTIORARI.

WALTER BACHRACH,
WALTER H. MORRIS,
Attorneys for Petitioner,
231 South LaSalle Street,
Chicago 4, Illinois.

PRINTED BY BRIEFING LAW PRINTING CO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 763

HUGH GREER CARRUTHERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

SECOND PETITION FOR REHEARING OF PETITION FOR CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States.

Now comes Petitioner, Hugh Greer Carruthers, and respectfully prays for a rehearing of the order of this Court of March 11, 1946 denying the Writ of Certiorari.

This petition for rehearing is based upon the fact that on March 25th this Court granted certiorari in *Ballard* v. *U. S.*, No. 782 this term, and on the same day denied

the petition for rehearing to the denial of the writ of certiorari of petitioner herein. As manifestly appears from the petition for certiorari and the former petition for rehearing herein, the primary question of paramount importance upon which the petition for certiorari herein is based involves the practical application in felony cases in the Federal Courts of the principles laid down by this Court in its earlier decision in *Ballard* v. *U. S.*, 322 U. S. 78. After that decision by this Court was rendered, the *Ballard* case was remanded to the Circuit Court of Appeals for the 9th Circuit wherein a further decision was rendered, 152 F. 2d 941, purporting to apply the law as laid down by this Court.

No injury would result to the United States from a consideration of the application of the decision of this Court in the *Ballard* case, in this case along with the review which this Court has granted on March 25th to the petitioners in the *Ballard* case. The joint consideration by this Court of the application of its earlier decision on these two records would obviously be of substantial assistance to this Court, in properly drawing the line between the constitutional prohibition of criminal prosecutions based upon religious beliefs and action pursuant thereto, and the power of Congress to make criminal, conduct of American citizens, which is intertwined with efforts to popularize and proselytize unorthodox religious beliefs.

Counsel for petitioner recognize in full measure their responsibility as officers of this Court as well as attorneys for petitioner and present this application in his behalf only after mature consideration of their obligations in both capacities and only because they believe that the conviction of petitioner herein was accomplished in a manner violative of the first amendment to the Constitution as interpreted and expounded in the decisions of this Court.

Wherefore, petitioner respectfully prays for a rehearing of the order of this Court of March 11, 1945 denying certiorari.

Respectfully submitted,

WALTER BACHRACH,
WALTER H. MOSES,
Attorneys for Petitioner.

I do hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay.

WALTER BACHRACH.